



DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

[Docket No. OAG 163; AG Order No. 4927-2020]

RIN 1105-AB62

Prohibition on Settlement Payments to Non-Governmental Third Parties

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Department’s regulations to set forth the principles of the Attorney General’s Memorandum of June 5, 2017, prohibiting the inclusion of provisions in settlement agreements directing or providing for a payment or loan to a non-governmental person or entity that is not a party to the dispute, except in defined circumstances.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue, NW, Washington, DC 20530, telephone (202) 514-8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

On June 5, 2017, then-Attorney General Sessions issued a Memorandum to the Heads of all Department of Justice Components and to all United States Attorneys titled, “Prohibition on Settlement Payments to Third Parties.” In this Memorandum, he stated: “Our Department is privileged to represent the United States and its citizens in courts across our country. We take this responsibility seriously. In the course of this representation, there may come a time when it is in the best interests of the United States to settle a lawsuit or end a criminal prosecution. Settlements, including civil settlement agreements, deferred prosecution agreements, non-prosecution agreements, and plea agreements, are a useful tool for Department attorneys to

achieve the ends of justice at a reasonable cost to the taxpayer. The goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct.”

However, certain previous settlement agreements involving the Department included provisions requiring payments to various non-governmental, third-party organizations as a condition of settlement with the United States. Those third-party organizations were neither victims nor parties to the lawsuits.

The June 5, 2017, Memorandum announced that the Department would no longer engage in this practice. Pursuant to the June 5, 2017, Memorandum, except in specific limited circumstances, “Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.” This policy is already incorporated into the Justice Manual at <https://www.justice.gov/jm/jm/1-17000-settlement-payments-third-parties>.

This final rule amends the Department’s regulations to reflect this policy, with certain changes from the June 5, 2017, Memorandum to clarify the scope of exceptions. This rule specifically clarifies that the policy extends to a payment or loan, whether in cash or in kind, to any non-governmental person or entity that is not a party to the dispute. The Miscellaneous Receipts Act provides that Government officials “receiving money for the Government from any source shall deposit that money with the Treasury.” *See* 31 U.S.C. 3302(b). “Receiving money for the Government” includes the “constructive receipt” of money “if a federal agency could have accepted possession and retains discretion to direct the use of the money.” *See* Effect of 31 U.S.C. 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980). This rule thus similarly forbids circumvention of the policy reflected in this statute via the use of in-kind payments.

This rule also revises the exceptions to the prohibition. Under the rule, there are four limited exceptions to the policy's prohibition. First, the prohibition does not apply to an otherwise lawful payment or loan that provides restitution or compensation to a victim, though in no case shall any settlement agreement require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects. Second, the prohibition does not apply when, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption. Third, the prohibition does not apply to payments for legal or other professional services rendered in connection with the case. Fourth, the prohibition does not apply to payments expressly authorized by statute or regulation, including restitution and forfeiture. Finally, this rule also deletes some examples of exception (c)(1).

The policy set forth in this final rule applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

Regulatory Certifications

Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. Accordingly, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b), and (d).

Regulatory Flexibility Act

This regulation will not have an impact on small entities because it pertains to personnel and administrative matters affecting the Department. An analysis under the Regulatory Flexibility Act was not required for this final rule because the Department was not required to

publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

Executive Orders 12866, 13563, and 13771 - Regulatory Review

This regulation has been drafted and reviewed in accordance with section 1(b) of Executive Order 12866, “Regulatory Planning and Review,” and section 1(b) of Executive Order 13563, “Improving Regulation and Regulatory Review.”

This final rule is “limited to agency organization, management, or personnel matters” and thus is not a “rule” for purposes of review by the Office of Management and Budget under section 3(d)(3) of Executive Order 12866. Accordingly this rule has not been reviewed by the Office of Management and Budget.

This rule is not subject to the requirements of Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” because it is not a significant regulatory action under Executive Order 12866, and because it is “related to agency organization, management, or personnel” and thus not a “rule” under Executive Order 13771, section 4(b).

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

Executive Order 13132 - Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. It is a rule of internal agency practice and procedure. Therefore, in accordance with Executive Order 13132, “Federalism,” the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in

any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Congressional Review Act

This action is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act, 5 U.S.C. 804(3)(B),(C). Therefore, the reporting requirements of 5 U.S.C. 801 do not apply.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509, 510, part 50 of title 28 of the Code of Federal Regulations is amended as follows:

PART 50-- STATEMENTS OF POLICY

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107-273, 116 Stat. 1758, 1824.

2. Add § 50.28 to read as follows:

§ 50.28 Prohibition on settlement payments to non-governmental third parties.

(a) The goals of a settlement agreement between the Department of Justice and a private party are to compensate victims, redress harm, or punish and deter unlawful conduct. It is generally not appropriate to use a settlement agreement to require, as a condition of settlement, payment to non-governmental, third-party organizations who are not victims or parties to the lawsuit.

(b) Except as provided in paragraph (c) of this section, Department attorneys shall not

enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan, in cash or in kind, to any non-governmental person or entity that is not a party to the dispute.

(c) Department attorneys may only enter into such agreements in four specific situations:

(1) When the otherwise lawful payment or loan, in cash or in kind, provides restitution or compensation to a victim, though in no case shall any such agreements require defendants in environmental cases, in lieu of payment to the Federal Government, to expend funds to provide goods or services to third parties for Supplemental Environmental Projects;

(2) When, in cases of foreign official corruption, a trusted third party is required to facilitate the repatriation and use of funds to directly benefit those harmed by the foreign corruption;

(3) When payment is for legal or other professional services rendered in connection with the case; or

(4) When payment is expressly authorized by statute or regulation, including restitution and forfeiture.

(d) This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

Dated: December 4, 2020.

William P. Barr.
Attorney General.

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